A.F.R.

HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR

046

Single Bench : Hon'ble Shri S.R. Nayak, CJ

Writ Petition No. 729 OF 2003

PETITIONERS

1. Karna Veer Ajmani
S/o Late Sunder Lal Ajmani,
Aged about 49 years
Profession-Service in State Bank of India,
Raigarh, R/o. Sonar Para, Munshi Gali,
Raigarh (C.G.)

2. Kailash Kumar Agrawal
S/o. Late Harbilas Agrawal
Aged about 46 years
Profession - Business
R/o. Sonar Para, Munshi Gali, Raigarh
(C.G.)

Versus

RESPONDENT

1. The State of Chhattisgarh
Through: The Secretary,
Home Department Govt. of Chhattisgarh
Mantralaya, D.K. Parisar, Shastri
Chowk, Raipur (C.G.)

2. The Collector, Raigarh (C.G.)

3. The Superintendent of Police,
Raigarh (C.G.)

4. Town Inspector, City Kotwali
Raigarh (C.G.)

Present:
Mr. A.N. Bhakta, learned counsel for the petitioners.
Mr. Yashwant Singh, learned Govt. Adv. for the State.

ORAL ORDER
(Passed on 16Th of December 2005)

The case of the petitioners in brief is as follows :

The petitioners are residing in rented houses owned by of Jama Masjid Trust, Raigarh which have dry lavatories. These dry lavatories were being cleaned by the employees of Municipal Corporation, Raigarh

regularly till July 2001. In view of the enactment of Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, the Municipal Authorities discontinued the service from August,2001 for which a suit was filed against the Municipal Authorities in the Court of Sub Divisional Magistrate, Raigarh. That Court ordered the Municipal Authorities to clean dry lavatories regularly. When the matter stood thus, the Commissioner, Municipal Corporation, Raigarh sent a notice to the petitioners to convert dry lavatories into flush lavatories. Under the circumstance, the petitioners requested the President, Jama Masjid Trust to construct flush lavatories in place of dry lavatories, but, the President did not respond to the request of the petitioners. The Commissioner, Municipal Corporation, Raigarh again sent notice to the petitioners as well as the President, Jama Masjid Trust, Raigarh to convert the dry lavatories into flush lavatories. Since, the President of Jama Masjid Trust, Raigarh did not start construction of flush lavatories, the petitioners caused a lawyer's notice to him dated 12.01.2003 (Annexure-P/5). In the said notice, the President, Jama Masjid Trust was told that if he does not start construction of flush lavatories before 16.01.2003, the petitioners themselves would undertake the construction of flush lavatories by borrowing loans from the bank and in that event, Jama Masjid Trust would be liable to pay the entire expenditure incurred by them including interest to be paid on the loan and the same would be deducted from the rent payable to the Jama Masjid Trust. Since, the President of the Trust did not respond to that notice also, petitioner No.1 started construction of the flush lavatories on 20.01.2003. He was called by the Town Inspector, City Kotwali, Raigarh, fourth respondent herein and verbally ordered to stop the work. The President of Jama Masjid Trust and his brother challenged the legality of the order of the Commissioner, Municipal Corporation and

threatened to disrupt the peace, if the petitioner No.1 continued construction of flush lavatory. The petitioner No.1 submitted an application to the Superintendent of Police, Raigarh, third respondent herein, requesting him to issue suitable instructions to the subordinate officers to ensure peace when the work would be resumed on 21.01.2003, but, his request went in vain. The petitioner No.1 also submitted an application to the Collector, Raigarh, second respondent herein on 20.01.2003 and the second respondent advised the petitioner No.1 to stop the construction work for two days so that he might look into the grievance, but, the second respondent too did not do anything further in the matter. Under the circumstance, the petitioners have filed this writ petition under Articles 226/227 of the Constitution of India in this Court on 18.02.2003 seeking intervention of this Court. 048

(2) The President, Jama Masjid Trust, Raigarh is not impleaded as party – respondent to the writ petition. However, subsequently, I.A. No. 9099/2005 was filed by the petitioners to implead the Commissioner, Municipal Corporation, Raigarh, Central Government, through Its Secretary, Department of Urban Development, New Delhi; The Sub Divisional Magistrate/ Executive Magistrate, District Raigarh and the President, Jama Masjid Trust, Raigarh as additional party – respondents. There is no need for me to consider that application for the simple reason that in my considered opinion the dispute brought before the Court by the petitioners cannot be resolved finally and conclusively in a summary proceeding under Article 226 of the Constitution of India and that dispute could be resolved only by a competent civil Court.

(3) I have heard learned counsel for the parties and perused the pleadings of the petitioners.

(4) The facts stated supra would clearly show that there is a 049 serious dispute between the petitioners and the President, Jama Masjid Trust with regard to the entitlement of the petitioners to construct flush lavatories in the subject property. The pleadings would also show that the dispute brought before the Court relates to facts and essentially is of a civil nature. This case does not involve enforcement of any of the fundamental rights of the petitioners. The power of this Court under Article 226 of the Constitution of India being discretionary, the Court would be justified in declining to entertain an application filed under Article 226 of the Constitution of India on the ground that the right claimed by the petitioners is not capable of being established in a summary proceeding under Article 226 of the Constitution of India, because, it requires a detailed examination of the evidence as may be had in a suit. This position is well settled by a catena of decisions of the Supreme Court. To cite a few such decisions are the Judgments in the cases of **Union of India Vs. Ghaus Mohammad[1]; Sohan Lal Vs. Union of India [2], Bokaro and Ramgur Ltd. Vs. State of Bihar [3]; Gunovant Vs. Municipal Committee[4]; Indu Bhushan Gupta Vs. State of U.P[5].** The object of Article 226 is the enforcement of an established right and not the establishment of a right or title. A petition under Article 226 cannot be converted into a suit. It is needless to state that in case of disputed questions of fact for decision, civil suit would be the appropriate action. The disputed questions of fact cannot be resolved without permitting the parties to lead evidence and tendering witnesses for cross-examination by each other. In general, therefore, a disputed question of fact is not

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1. AIR 1961 SC 1526;
2. AIR 1957 SC 529;
3. AIR 1963 SC 516
4. AIR 1970 SC 802
5. AIR 1979 SC 1857.

investigated in a summary proceeding under Article 226, particularly 050 where an alternative adequate remedy is available *e.g.* where merits of rival claims to property, or a disputed question of title arises or where disputed facts have to be investigated in order to give relief to the petitioner, or where it is not possible for the Court to grant relief to the petitioners on the basis of the materials placed before the Court; or where it requires investigation of disputed facts and involves recording a finding on questions of fact.

(5) In the result and for the foregoing reasons, without expressing any opinion on the right of the petitioners to construct flush lavatories in the subject property, I dismiss the writ petition, however, reserving liberty to the petitioners to work out their legal remedies before the jurisdictional civil Court by way of private law review for declaration, injunction, damages etc.. or before the authorities of the respondent – Corporation. In the facts and circumstances of the case, the parties shall bear their respective cots.

Sd/-
Chief Justice

Subba